RANGAPULA & ANOR. v. PUBLIC PROSECUTOR

[A.Cr.J. (Yusof Abdul Rashid J.) April 13, 1981]
[Johore Bahru — Criminal Appeal No. 42 of 1980]

Criminal Law and Procedure — Alibi — Scope of Criminal Procedure Code (F.M.S. Cap. 6), s. 402A(1).

The facts of this case are briefly as follows. On September 16, 1979 one Putupathi, pillion rider Subramaniam, Sukumaran and pillion rider Rasppan were on their way home on two motor-cycles when they were attacked by some persons armed with parangs. It was alleged that the appellants were among the assailants. The appellants denied that they were among the assailants and proposed to adduce evidence that at the time of the alleged offence they were at a place other than where the offence was alleged to have been committed. However, since no notice was filed in compliance with section 402A of the Criminal Procedure Code, the appellants were precluded from adducing such evidence. The appellants were convicted and sentenced by the learned President of the Sessions Court for offences under sections 326 and 324 of the Penal Code. They appealed against the said decision.

Held: (1) a trial Magistrate has no discretion to admit any evidence in support of a defence of alibi where the provisions of section 402A of the Criminal Procedure Code have not been complied with. In the present case the learned President was right in not allowing the evidence of the appellants' respective wives to be adduced as the appellants had failed to comply with section 402A of the Criminal Procedure Code;

(2) caution must be exercised in accepting evidence regarding identity of an accused person especially where there is evidence contradicting the evidence of the principal witness who alleged that he was able to identify the accused. Where the evidence of identity is poor then there is a need for supporting evidence as to the identification of an accused;

(3) in this case no sufficient care had been given by the learned President in testing the evidence of the PW4 with the evidence of the other witnesses and such failure had resulted in a miscarriage of justice. In such circumstances it was unsafe for the learned President to convict the appellants relying solely on the evidence of PW4 without first cautioning himself before doing so.

Cases referred to:-

(1) *R.* v. *Lewis* [1969] 2 Q.B. 1.
(2) *R.* v. *Hassan* [1970] 1 Q.B. 423.
(3) *R.* v. *Turnbull & Ors.* [1976] 3 All E.R. 549.
(4) *Mahinder Singh* v. *Public Prosecutor* [1967] 1 M.L.J. 126.

CRIMINAL APPEAL.

R.K. Menon for the appellants.

John Louis O'Hara (Deputy Public Prosecutor) for the respondent.

Yusof Abdul Rashid J.: The appellants who were convicted and sentenced by the learned President of the Sessions Court, Johore Bahru for offences under sections 326 and 324 of the Penal Code appeal to this court against the whole decision of the said learned President. Several grounds were proffered but I found only those relating to the evidence of alibi and identity of the appellants merit consideration.

The facts may briefly be stated thus:

"On September 16, 1979 about 9.30 p.m. Putupathy s/o Chellapan, pillion rider Subramaniam s/o Arumugam, Sukumaran s/o Arumugam and pillion rider Rasppan s/o Palany were on their way home on two motor-cycles. Not far from the gate of the Fraser Estate, Kulai, they were attacked by some persons armed with parangs. As a result Subramaniam s/o Arumugam sustained grievous hurt and Rasppan s/o Palany and Sukumaran s/o Arumugam sustained hurt. It was alleged that the appellants were among the assailants. The appellants denied that they were among the assailants and proposed to adduce evidence that at the time of the alleged offence they were at a place other than where the offence was alleged to have been committed. However, since no notice was filed in compliance with section 402A of the Criminal Procedure Code, the appellants were precluded from adducing such evidence."

To establish a *prima facie* case, the prosecution called upon Subramaniam s/o Arumugam, Rasppan s/o Palany and Sukumaran s/o Arumugam to give evidence but offered Putupathy s/o Chellapan to the defence.

Sukumaran s/o Arumugam testified that on the date and at the time in question he was riding a motor-cycle with Rasppan s/o Palany riding as a pillion rider. They were following another motor-cycle ridden by Putupathy s/o Chellapan with Subramaniam s/o Arumugam as pillion. The head-lights of both motor-cycles were on. About a chain away from the gate of the Fraser Estate, he heard someone said to the front motor-cyclists, "Bukan awak orang! Awak boleh jalan". He saw appellants armed with parangs rushed at him. He was able to recognise the appellants from the headlight of his motor-cycle. On seeing this he stopped his motor-cycle, abandoned it, and ran away. While trying to run away, he was slashed on his right fore-arm. Despite being injured he managed to escape and about 2.30 a.m. he went to Kulai Police Station where he met Inspector Abdul Razak bin Hashim to whom he gave the names of the appellants being two of the assailants.

Rasppan s/o Palany the pillion rider of the motor-cycle ridden by Sukumaran said in evidence that at that particular date, time and place a dark person stopped Sukumaran and him. Sukumaran stopped the motor-cycle. The person then asked them to proceed. When he had gone a few yards he felt an object hit him on the right ear. He lost consciousness and fell on the ground.

Subramaniam s/o Arumugam adduced in evidence that at that particular date, time and place he was riding pillion on a motor-cycle ridden by Putupathy s/o Chellapan. A man wearing a mask stopped them. When the motor-cycle stopped, the light and engine were switched off. The man in mask, using a torch-light, flashed at the licence plate of the motor-cycle. Then he heard the man said "Bukan nombor ini, jalan". They proceeded on. About 15 feet away he felt severe pain on his right thigh as if he had been hit with a stick. He fell on the ground. While lying on the ground he was slashed on his hands but he did not know who did that. He heard Sukumaran shout out "Run away, people are chasing".

It is to be observed that there are material discrepancies in the evidence of the three witnesses as to how the incident had happened. Be that as it may, there was no doubt at all that the witnesses were attacked but were the appellants among those assailants? Were the appellants the persons who inflicted the vital blows with parangs? In answer to the charges the appellants wished to prove that they were not at the scene when the alleged offences were committed. The learned President refused to admit evidence in support of the said alibi. In the grounds

of judgment the learned President stated —

"Accused 1's defence was one of alibi. He denied that on the date and time specified in the 3 charges he was anywhere at or near the scene of the incident. On the date and time specified in the 3 charges he said he was at home with his wife at Kulai Besar Estate. When the police came to his house on September 17, 1979 at about 6.30 a.m. he told them that he knew nothing about the incident and he was indoor with his wife the whole night...."

As regards the second appellant, the learned President said —

"Accused, 2 also elected to give evidence. His defence was also one of alibi. He said that on September 16, 1979 he came back from work at about 7.30 p.m. He had his dinner and went to bed around 8.00 p.m. He was sleeping with his wife. At about mid-night the police came. They conducted a search of the house. He was with his wife. They then took him to the Police Station. He told them that he had nothing to do with the incident...."

The learned President then proceeded —

"Both Accused wanted to call their respective wives to give evidence in support of their defence of alibi. However as the requirement of section 402A(1) regarding the giving of notice to the Public Prosecutor was not complied with, I disallowed such evidence in support of the defence of alibi being given."

Now section 402A(1) of the Criminal Procedure Code provides —

"(1) Where in any criminal trial the accused seeks to put forward a defence of alibi, evidence in support thereof shall not be admitted unless the accused shall have given notice in writing thereof to the Public Prosecutor at least ten days before the commencement of the trial."

I am not aware of any judicial decision relating to the applicability or otherwise of the said section 402A nor was I advised thereon. However, in England, the Court of Appeal had occasion to consider the effect of section 11 of the Criminal Justice Act 1967 — the provisions of which are not dissimilar to those of the said section 402A. Section 11 of the United Kingdom Criminal Justice Act 1967 *inter alia* provides —

"(1) On a trial on indictment the defendant shall not without the leave of the court adduce evidence in support of an alibi unless before the end of the prescribed period, he gives notice of particulars of alibi....

....

(8) .... 'evidence in support of an alibi' means evidence tending to show that by reason of the presence of the defendant at a particular place or in particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of alleged commission. 'the prescribed period' means the period of seven days from the end of the proceedings before the examining justices."

In *R.* v. *Lewis*[1] the Court of Appeal of England held:

"(1) that the only evidence in support of an alibi to which section 11 of the Criminal Justice Act, 1967, applied was evidence relative to the whereabouts of the defendant at the time when the offence was alleged to have been committed: evidence relative to his whereabouts on another occasion was not subject to the restrictions of section 11 however significant the evidence might be to the issues in the case.

(2) That any question arising for the purposes of section 11(8) as to the place or date at or on which the offence was alleged to have been committed had to be resolved on the committed charges and depositions available to the defendant at the end of the proceedings before the examining justices...."

The principles elicited from the above decision may equally be applicable to section 402A of the Criminal Procedure Code. In my judgment section 402A is not applicable and notice required to be served thereunder need not be so served to render "evidence in support of a defence of alibi" admissible —

(a) where such evidence is in support of an alibi in respect of a day or time different from those specified in a charge; and

(b) where a charge is amended in the course of the trial relating to either the date, time or place set out in the original charge.

Another English Court of Appeal case relevant to the issue is *R.* v. *Hassan*,[2] wherein the Court of Appeal held —

"... that the evidence sought to be adduced was not 'evidence in support of an alibi' within section 11(8) of the Criminal Justice Act, 1967, because section 11 contemplated the commission of an offence at a particular place whereas the offence charged was not anchored to a particular location other than Cardiff and that, accordingly, section 11(1) did not apply and the evidence should not have been excluded."

A general principle may be deduced from the above case in relation to the applicability of section 402A of the Criminal Procedure Code and that is to say, where there is insufficient particularisation in the charge regarding the place where the offence is alleged to have been committed, section 402A shall not apply.

Needless to say that an accused shall not be disallowed to state in evidence that a prosecution witness had made a mistake in identifying him as the person who had attacked him on the ground that the accused, on the relevant date and time as specified in the charge, was somewhere else other than the place where the alleged offence was committed. Such evidence may be regarded as a total denial of the charge and not "evidence in support of an alibi" within the meaning of section 402A of the Criminal Procedure Code. I am of the view that section 402A only applies when the accused proposes to call other person or persons as witness or witnesses to support such evidence.

Section 402A of the Code is enacted to prevent any person from fabricating an evidence of alibi and to enable the police to interrogate the intended witness or witnesses well before the date of trial to ascertain the validity of such a defence. It is indeed a condition precedent to the admissibility of the evidence of a witness purporting to support the alibi of an accused person. The non-compliance with the requirements of section 402A of the Code will render such evidence in support inadmissible. As such, a trial Magistrate has no discretion to admit any evidence in support of a defence of alibi where the provisions of section 402A of the Code have not been complied with. To allow such evidence to be admitted notwithstanding the breach of section 402A of the Code will defeat the intention of the Legislature to cure the mischief of an accused person manufacturing alibi evidence.

In the instant appeal the appellants were charged that on September 16, 1979 at about 9.30 p.m. at the junction of Jalan Fraser and Jalan Kota Tinggi, Kulai, the appellants voluntarily caused hurt and grievous hurt to some persons named in the charges. The

date, time and place were sufficiently particularised in the charges and the appellants denied that on such date, and at such time they were at such place. They proposed to call their respective wives to support such contention but since they had failed to comply with the requirements of section 402A of the Code, the learned President refused to allow them to do so. In my judgment, the proposed evidence of appellants' respective wives was not admissible under the circumstances and was rightly excluded. The English Court of Appeal cases of *R.* v. *Lewis* and *R.* v. *Hassan* do not apply.

Appellant Rangapula s/o Ramasamy in evidence said that on the material date and time he was at home with his wife at Kulai Besar Estate. When the police came to his house on September 17, 1979 at about 6.30 a.m. he told them that he knew nothing about the incident and that he was indoors with his wife the whole night. Appellant Rajagopal s/o Pechiappan adduced in evidence that on September 16, 1979 he came back from work at about 7.30 p.m. and after having his dinner he went to bed with his wife. While sleeping with his wife the police came to the house about midnight.

Having considered the defence of both appellants the learned President concluded —

"I have considered the Accused 1's defence of alibi in the light of the whole evidence adduced. I rejected his defence of alibi...."

and in respect of appellant Rajagopal's defence —

"I have considered the Accused 2's defence of alibi in the light of the whole evidence adduced. I rejected his defence of alibi...."

Thus, it is not true that the learned President, as alleged by the counsel for the appellants, had failed to consider the defence of alibi proffered by the appellants.

On this ground the appeal fails.

Now I turn to the identity of the appellants being the assailants. It is to be borne in mind that in the lower court, the appellants were undefended by counsel and this throws a heavier responsibility on the learned President to prevent any possible miscarriage of justice.

The English Court of Appeal in *R.* v. *Turnbull & Ors.*[3] set out certain useful guidelines to trial judges in directing a jury relating to the question of identity where the defence raised the issue of mistaken identity as a defence. The headnotes of that case read —

"Whenever the case of an accused person depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting in reliance on the correctness of the identification. He should instruct them as to the reason for that warning and should make some reference to the possibility that a mistaken witness could be a convincing one and that a number of witnesses could all be mistaken. Provided that the warning is in clear terms, no particular words need be used. Furthermore, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. If in any case, whether being dealt with summarily or on indictment, the prosecution have reason to believe that there is a material discrepancy between the description of the accused given to the police by the witness when first seen and his actual appearance, they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases, if the accused asks to be given particulars of any description, the prosecution should supply them. Finally, the judge should remind the jury of any specific weaknesses which have appeared in the identification evidence.

Where the quality of an identification is good, the jury can safely be left to assess the value of the identifying evidence even if there is no other evidence in support, provided always that an adequate warning has been given about the special need for caution. However, where in the opinion of the judge the quality of the identifying evidence is poor, he should withdraw the case from the jury and direct an acquittal unless there is other evidence which supports the correctness of the identification. The other evidence may be either corroboration in the legal sense or something which convinces the jury that the identification is not mistaken; any odd coincidence, if unexplained, may be supporting evidence. The judge should identify to the jury any evidence which he adjudges capable of supporting the evidence of identification and he should tell the jury if there is any evidence or circumstances which cannot support an identification.

....

A failure to follow these guidelines is likely to result in a conviction being quashed and will so result if, in the judgment of the Court of Appeal, on all the evidence, the verdict is either unsatisfactory or unsafe...."

Again, in the Federal Court case of *Mahinder Singh* v. *Public Prosecutor*[4] the question of identity of an assailant was in issue and Ong F.J. (as he then was) in delivering the judgment of the court said —

".... It was not sufficient merely that the appellant appeared quite certain in his own mind that the accused was his assailant. It was clearly necessary for the court to examine also the grounds of his belief before regarding the question as closed. We have therefore, taken into consideration the complainant's answers elicited in cross-examination, which were undoubtedly material but which the judge had failed to take into account."

His Lordship then pointed out certain contradictions found in the evidence of the complainant and said —

"When the above self-contradictions are considered — which, we regret to say, was not done by the trial judge at all — there can no longer be that degree of satisfaction of guilt of an accused person which alone can justify a verdict of guilt.

There are certain other material facts, too, which could not be consistent with guilt. *There admittedly was no animosity between the parties and the complainant himself could think of no reason why the appellant should have made the unprovoked attack on him.* If there was no reason, on the one hand, for a false accusation, there was equally no reason, on the other, for the appellant to attack his inoffensive neighbour. The seriousness of the injury and the kind of weapon used should rather point to a vicious enemy and consequently, to a third party who had vanished as silently as he had appeared on the scene." (Italics added.)

The above authorities point out the need to use caution in accepting evidence regarding identity of an accused person especially when there is evidence contradicting the evidence of the principal witness who alleged that he was able to identify the accused. Where the evidence of identity is poor then there is a need for supporting evidence as to the identification of an accused.

In his grounds of judgment, the learned President dealt with the evidence of the identity of the appellants in the following manner —

"I accepted the evidence of *PW4 that he saw the Accused 1 and 2 with the head light of his motor cycle* when they were in front of his motor cycle and *they were not masked. He saw them for a few seconds* as they came nearer to him with parangs and before he dropped the motor cycle on the ground and ran away. *Both Accused were no strangers to him.* He

had known Accused 1 for about 2 years prior to the date of incident and he had worked with Accused 1 for about 6 months in 1977. With regard to Accused 2, PW4 had known him for about 6 to 7 years. He had also spoken to him whenever he met him! *I accepted PW4's evidence that Accused 1 inflicted the injury on him with a parang.* I found that he was not mistaken in his identification of the 2 Accused as the persons who took part in the assault. I found as a fact that both Accused took part in the attack on PW4, PW5 and PW6 by means of parangs in furtherance of the common intentions of them all. PW4's story that he saw the Accused rushing towards him to attack him and how he saw them was reasonable and probable. His evidence regarding the identity of the assailants was consistent with the information he gave to PW2 soon after the assault." (Italics added.)

Since the learned President was satisfied with the certainty in the mind of PW4's evidence regarding the identification it is necessary to examine in detail whether it was justified for the learned President not to entertain any doubt on this issue. The indisputable fact was that the night was dark and at the scene there was no light. PW4 was able to identify the appellants from the light of his motor-cycle headlight. Riding pillion with PW4 on the motor-cycle was PW5 and his evidence was as follows —

"When we had passed about 6—7 feet from the gate a dark person, an Indian, stopped our motor cycle.

We stopped. That dark person asked us to proceed. We proceeded a few yards and I was hit by an object on my right ear.

Then I lost consciousness and fell on the ground."

PW5 in his evidence further testified —

"I saw only one person. He was on my left hand side. I was hit from my back.

When I reached the gate of Fraser Estate, I was not paying attention to the road and the surrounding.

I did not know who hit me.

We stopped for a short while. When we proceeded for 4 or 5 feet I was struck from the back."

Now, according to PW5, a dark person stopped the motor-cycle ridden by him and PW4. On being ordered to do so, they stopped. They were then allowed to proceed on but hardly had they proceeded on for about 4-5 feet, PW5 was struck from behind on his right ear. He fell and lost consciousness. When this piece of evidence is compared with that adduced by PW4, contradictions on material facts are disclosed. The version of PW4 was —

"When I had covered a distance of about one chain away from the gate I heard someone saying in Malay to the front motor cyclist 'Bukan awak orang, awak boleh jalan.' When I heard this, the front motor cycle was about 6—7 feet ahead of me. This voice came from the left side of the road.

After having heard this voice, I saw 2 persons rushing from the right side of the road towards me. I was slashed on my right hand.

As soon as I saw these 2 persons rushing towards me I quickly stopped my motor cycle. These two persons were the 2 Accused persons (identified). I just left the motor cycle on the road. It was lying on the ground. While I was trying to run away from there I was slashed on my right hand.

....

It was Accused 1 who slashed me. He slashed me with a parang once. Before I was slashed I did not see what the 2 Accused did.

....

I could see the 2 Accused with the help of the head light of my motor cycle. They came from the right hand side of my motor cycle. I could see them with the light when they were in front of me. I saw them for a few seconds. When they drew nearer I just dropped my motor cycle on the road. While trying to run away I was slashed on my right hand — right forearms....

When I saw them rushing towards me I saw both the Accused were armed with a parang each, that was why I dropped the motor cycle on the road and started to run. The way they came with parangs made me believe that they were going to attack me.

As soon as I dropped the motor cycle, my pillion Rasppan fell on the ground. I did not know what happened to him as I ran away...."

Comparing the evidence of PW4 with that of PW5, we find several material contradictions:

(a) while PW5 said that PW4 and he were stopped by an Indian and then allowed to proceed on, PW4 deposed that it was the front motor-cyclists who were stopped and he only stopped when he saw the two accused persons rushing at him with parangs;

(b) according to PW5 when the motor-cycle proceeded on after being stopped that he was struck on his right ear. He fell and was unconscious. But PW4 gave totally a different version. PW4 testified that when he saw the accused rushing at him, he dropped the motor-cycle and started to run away. It was because of this that PW5 fell off the motor-cycle.

(c) PW5 only saw one person who stopped the motor-cycle and nobody else. Had the accused come from the front in the headlight, it was strange that PW5 did not see them especially when PW4 alleged that the accused came with parangs in their hands.

The evidence of PW4 was unsatisfactory as according to him as soon as he dropped the motor-cycle he ran away. As he was running away Accused No. 1 slashed him with a parang on his right forearm. It is important to note that it was dark at the scene. PW4 could not possibly have seen Accused No. 1 slashing him as it was dark and he was then running away. There was no evidence to show that PW4 faced Accused No. 1 when he was slashed. Neither was there evidence to show that PW4 saw this with the help of some light. Though it is rather unimportant for the purpose of section 34 to show that any one or more of the accused had struck the blow, it is important to test the credibility of PW4.

It is unfortunate that the learned President did not deal with the evidence of PW4 and PW5 in detail to show that he was aware of the material contradictions and that he had cautioned himself before believing and accepting the evidence of PW4 in its entirety despite the said material contradictions.

PW4's evidence should also have been tested against the evidence of PW6 by the learned President. Again in this respect the learned President had failed to do.

The testimony of PW6 disclosed —

"... When we had passed about 1½ chain from the gate I saw a man wearing a mask stopped our motor cycle. He came from the left of the road and went to the front of our motor cycle. Only one person stopped the motor cycle.

When we were asked to stop the motor cycle, the motor cycle stopped. The lights went off and the engine went off.

The person who stopped this motor cycle flashed a torch light

at the rear number plate of the motor cycle. Then this person said in Malay 'Bukan nombor ini, jalan'. Then the rider of the motor cycle, Putupathy, started the motor cycle and we proceeded on. . . ."

It is observed that the person who stopped Putupathy and PW6 wore mask. Had the accused been his accomplices, one would expect the whole group to wear masks. However, on being questioned by the learned President, PW4 said that he did not see the accused wearing any mask. Be that as it may, the learned President should have entertained certain degree of suspicion on the credibility of PW4 as to whether or not the assailants were masked.

PW4 said on oath that there was no misunderstanding between him and the appellants but the attack on PW4, PW5 and PW6 was vicious and with vengeance. Again, although motive of the attack is only relevant in so far as it is one of the several aspects to test the credibility of PW4, it was the duty of the learned President to weigh the veracity of the evidence of PW4 bearing in mind the want of motive. As Ong F.J. (as he then was) in the Federal Court case of *Mahinder Singh, supra,* said —

"There are certain other material facts, too, which could not be consistent with guilt. There admittedly was no animosity between the parties and the complainant himself could think of no reason why the appellant should have made the unprovoked attack on him. If there was no reason, on the one hand, for a false accusation, there was equally no reason, on the other, for the appellant to attack his inoffensive neighbour. The seriousness of the injury and the kind of weapon used should rather point to a vicious enemy. . . ."

Considering the grounds of judgment of the learned President as a whole, I am satisfied that no sufficient care had been given by the learned President in testing the evidence of PW4 with the evidence of PW5 and PW6 and such failure has resulted in a miscarriage of justice. In consequence, I am satisfied that it was unsafe for the learned President to convict the appellants relying solely on the evidence of PW4 without first cautioning himself before doing so.

It is not enough for the learned President to believe PW4 regarding the identification of the appellants just because PW4 had known the appellants for quite a considerable length of time. At the material day and time, he was able to see the appellants in a flash. As Lord Widgery C.J. said in the English Court of Appeal case of *R.* v. *Turnbull & Ors., supra,* at page 552 —

". . . even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

On the above grounds I would allow the appeal and set aside the conviction and sentence.

Appeal allowed.

Conviction quashed and sentence set aside.

Solicitors: *R.K. Menon & Co.*

TUMLONG KUANDI v. PUBLIC PROSECUTOR

[A.Cr.J. (Yusof Abdul Rashid J.) May 19, 1981]

[Johore Bahru — Criminal Appeal No. 30 of 1980]

Customs and Excise — Conveying dutiable goods in local craft without permit — Strict liability — Customs Act, 1967, ss. 49(1) & 135(1)(e).

The appellant sought to appeal against the whole judgment of the learned magistrate who convicted and sentenced him for offences under section 49(1) and section 135(1)(e) of the Customs Act 1967. The appellant was the *taikong* of a vessel carrying 3.195 tons of tin ore and 5.129 tons of tin slag. The said vessel was intercepted by customs officers on December 24, 1979. The appellant failed to produce any permit and the vessel was seized. The learned magistrate had found that the vessel was intercepted when it was within the Malaysian Territorial Waters.

The appellant contended that (1) he did not know that he was in Malaysian Territorial Waters or that he was required to have permission to convey the said tin ore; (2) it was encumbent on the prosecution to prove that the tin ore and slag found in the vessel was for export out of Malaysia; (3) on the appellant being successful in establishing that the vessel was in transit, the appellant had made out a valid defence deserving acquittal.

Held: (1) the prosecution need only to prove that, on import or export, customs duties are leviable on such goods without having to prove that such goods are in fact imported into or exported out of Malaysia;

(2) even if the vessel was in transit, it is obligatory on the consignor or consignee of the goods to obtain written permission of the Director-General of Customs where the vessel was to pass through Malaysian Territorial Waters. Failure to obtain such written permission would expose the person responsible for the vessel to a charge under section 49(1) of the Customs Act;

(3) the offence created is a strict liability offence, the commission of which requires no guilty intention or knowledge; in the circumstances it was no defence for the appellant to contend that he did not know that he was in Territorial Waters of Malaysia at that material time and place;

(4) the prosecution had failed to prove that the goods conveyed in the "local craft" were "dutiable goods" since the prosecution had failed to prove that such goods were indeed exported out of Malaysia. The conviction and sentence under section 135(1)(e) of the Customs Act were set aside;

(5) in the present case an offence under section 49(1) of the Customs Act had been committed and proved. In the circumstances, the appeal against the forfeiture of the "local craft" and tin ore and tin slag was dismissed.

Case referred to:-

(1) *Ng Kim Huat* v. *Public Prosecutor* [1961] M.L.J. 308.

CRIMINAL APPEAL.

R.K. Menon for the appellant.

Abu Seman bin Haji Yusof (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Yusof Abdul Rashid J.: This is an appeal against the whole judgment of the learned Magistrate who convicted and sentenced the appellant for offences firstly under section 49(1) and secondly under section 135(1)(e) of the Customs Act 1967. The goods seized by the customs in relation thereto were ordered to be forfeited. I allowed the appeal against the conviction and sentence under section 135(1)(e) of the Act but dismissed the appeal in respect of the first charge. Now I state my reasons.

The facts of the case may be briefly stated thus: